No. 15006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,

Appellant,

vs.

QUAN YOKE FONG,

Appellee.

BRIEF FOR APPELLEE.

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Jurisdiction.

This is an appeal from a judgment in favor of plaintiff in an action wherein plaintiff sought to establish his status as a national of the United States. The action was brought pursuant to the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) which provides, in part, as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or

in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. . . ." (54 Stat. 1171-1172; 8 U. S. C. 903.)

In his Petition to Establish Nationality of the United States Pursuant to Section 903, Title 8, U S. C. A. [T. R. 3] appellee alleged, in paragraph I thereof, that he was born in China on February 13, 1930; in paragraph II thereof that he is the legitimate son of Quan Lun Hong; that said Quan Lun Hong was a citizen of the United States at the time of plaintiff's birth, and has lived and resided in the United States since May, 1915; that plaintiff's father, Quan Lun Hong, resides in Los Angeles, California; that plaintiff claims residence in Los Angeles, California, the home of his father; that he is a citizen of the United States [T. R. 3-4]; in pargaraphs III and IV thereof that he claims the right and privilege as a citizen of the United states "to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that the said defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that he is not a national of the United States." [T. R. 5.]

In his answer [T. R. 6] defendant denied, on information and belief, the allegations contained in paragraph I of the complaint; denied that Quan Lun Hong was at any time a citizen of the United States, or that he was admitted to the United States at any time as a citizen by

the United States Immigration and Naturalization Service, as alleged in paragraph II of the complaint and denied on information and belief all other allegations contained in said paragraph II; denied each and every allegation contained in paragraphs III, IV and V of the complaint and denied that plaintiff is, or ever has been, a citizen of the United States, or entitled to any rights or privileges as such. [T. R. 6-7.]

The complaint herein was filed on December 23, 1952, before the repeal of Section 503 of the Nationality Act of 1940, by Section 403(a)(42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952.

Since the judgment of the District Court [T. R. 38-39] was a final decision, this Court has jurisdiction of an appeal from that decision under the provisions of 28 U. S. C. 1291 and 1294(1).

Statutes Involved.

Section 1993 of the Revised Statutes of the United States, the pertinent part of which, at the date of plaintiff's birth and prior to its amendment by the Act of May 24, 1934, read as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, which provides in part, and insofar as is pertinent to this action, as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States . . ."

Statement of the Case.

Appellant's statement of the case is substantially correct. However, there are certain additional facts which appellee believes should be called to the attention of the Court.

It is true, as stated by appellant, that on March 21, 1955, the case had been continued to July 11, 1955, "for setting for trial." [T. R. 8.] On May 6, 1955, appellant filed a motion to dismiss pursuant to Rule 12(b)(1) and (6) and Rule 12(h), Federal Rules of Civil Procedure, on the grounds that the court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted [T. R. 13], and at the same time filed a motion

to require appellee and his parents to submit to blood tests under Rule 35, Federal Rules of Civil Procedure. [T. R. 9.] These motions were heard on May 16, 1955, appellee appearing in opposition to both motions, and the Court denied the motion to dismiss and granted the motion to require plaintiff and his parents to submit to blood tests. [T. R. 16.] At the time of the hearing on the motions, appellee's counsel inquired of the Court as to whether it could indicate when the matter might be tried, stating that the plaintiff's mother desired to visit plaintiff in Hong Kong and would schedule her trip according to the trial date. The Court said that it would prefer to take the testimony of the parents before plaintiff's mother went to Hong Kong, and stated:

> "The Court: Can we do this? If the mother and father are here, can't we go ahead and take their testimony and then hold in abeyance the report on the blood sample? . . .
>
> Mr. Dooley: Yes, your Honor. The defendant has no objection to that procedure. . . ." [T. R. 62.]

The matter was then set for trial on May 31, 1955, and when the case was called on that date the following colloquy occurred between the court and counsel:

> "Miss Parker: Ready for the plaintiff.
>
> Mr. Dooley: The defendant is ready, your Honor.
>
> The Court: When will you be ready to go to trial?
>
> Miss Parker: Any time.

Mr. Dooley: Any time, your Honor. This is a case where decision will be postponed until the blood test is determined.

The Court: Tomorrow?

Miss Parker: Satisfactory.

Mr. Dooley: Satisfactory." [T. R. 64.]

At the conclusion of the taking of the testimony of plaintiff's witnesses and the cross-examination by defendant, the matter was continued for 60 days pending receipt of the blood tests taken pursuant to the order of Court of May 16, 1955, and upon receipt thereof the matter was to be set for further hearing. [T. R. 145.]

On July 1, 1955, appellant filed a motion for a supplemental order to require appellee to furnish a blood sample upon the grounds that it was impossible to test the blood sample received by the West Coast Medical Laboratories from Hong Kong on June 14, 1955, and identified by markings as containing the blood of plaintiff, such blood sample having hemolyzed. [T. R. 21.]

Appellee appeared in opposition to the motion, which was heard on July 18, 1955, and filed the affidavit of plaintiff's father, Quan Lun Hong, to which were attached as exhibits letters from the plaintiff together with a statement showing that plaintiff had been billed and paid Dr. Eric Vio the sum of $256.00 Hong Kong currency and $4.00 American currency in connection with the taking of the blood sample. [T. R. 23-28.] On August 16, 1955, the Court denied appellant's motion for a supplemental order to require appellee to furnish a blood sample and ordered judgment for appellee. [T. R. 147.]

On September 12, 1955, appellant moved for a new trial [T. R. 57], which motion was denied on October 3, 1955. [T. R. 57.]

ARGUMENT.

I.

The Issues.

Appellant does not challenge the sufficiency of the evidence to support the findings of fact and conclusions of law that plaintiff is a citizen and national of the United States. He is attacking the judgment solely upon (1) jurisdictional grounds and (2) alleged error on the part of the District Court in (a) denying appellant's motion for new trial, (b) preventing appellant from presenting or offering evidence that plaintiff's blood was incompatible with that of his parents and (c) denying appellant's motion for a supplemental order to require plaintiff to furnish a blood sample.

Appellee admits that in order to maintain his action under Section 503 of the Nationality Act of 1940, it was incumbent upon him to prove as a jurisdictional requisite that at the time his complaint was filed he had been denied a right or privilege as a national of the United States upon the ground that he was not a national of the United States. It is appellee's contention, however, that the allegations necessary for jurisdiction were alleged in the complaint and were proved at the trial of the action.

II.

The District Court's Finding That the Delay in Processing Plaintiff's Passport Application Was Unreasonable and the Failure to Act on Such Passport Application Within a Reasonable Time was a Denial of Plaintiff's Rights and Privileges as a National of the United States Is Sustained by the Evidence and Meets the Jurisdictional Requirement for an Action Under Section 503 of Denial on the Grounds Appellee Is Not a United States National.

In his complaint plaintiff alleged that he was born on February 13, 1930, in China; that he is the legitimate son of a citizen of the United States; that he claims residence in Los Angeles, California, the home of his father; that he claims to be a citizen of the United States and entitled to the rights and privileges of a citizen of the United States; that he had theretofore filed an application for an American passport or other travel document as a citizen of the United States with the American Consulate General at Hong Kong for the purpose of traveling to the United States to join his father; that the American Consulate General at Hong Kong has refused to issue to plaintiff the passport applied for, thereby denying plaintiff's American citizenship and his rights and privileges as a citizen of the United States; that plaintiff has at all times claimed and now claims the right and privilege as a national of the United States of America to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that the defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that he is not a national of the United States. Such allegations are suf-

ficient to give the court jurisdiction to hear and determine the cause. (*Jew May Lune v. Dulles,* 226 F. 2d 796.)

In *Jew May Lune v. Dulles, supra,* the court stated, at page 798:

> "There were sufficient 'facts' set up in the petition to give the court jurisdiction to hear and determine the cause. It was alleged that her rights were denied upon the ground that she was not a national. Under federal forms of pleading, this is sufficient, and, besides, there were allegations which, if proved, would show she was a national and that there was a refusal to issue a passport. The defendant denied these allegations. This was sufficient basis for jurisdiction. The court was then required to try the matter.
>
> "* * *
>
> ". . . where allegations have been made which are necessary for jurisdiction, the action will fail if these are not proved. The reservation in 12(h), Federal Rules of Civil Procedure, is for extraneous circumstances, which demonstrates that the court has no authority to hear and determine. All tribunals in the federal system must at all stages of the proceeding make certain of the possession of power to act. But, where there are allegations of key jurisdictional facts which are controverted, there always exists power to try the issues thus made. Jurisdiction existed to try the questions here."

Appellant asserts, however, that appellee failed to prove the facts alleged in the complaint in that he has not established that there was either an express or an implied denial of plaintiff's passport application prior to the date the action herein was filed.

The action of a consular officer in denying an application filed by an alleged foreign-born son of an American citizen for a passport to the United States is a denial of a claimed right or privilege as a national of the United States upon the ground that he was not a national of the United States, such as would give the federal court jurisdiction to determine nationality status. (*Fong Nai Sun v. Dulles,* 219 F. 2d 269; *Chin Chuck Ming v. Dulles,* 225 F. 2d 849.)

Plaintiff's passport application was executed and filed with the United States Consulate General at Hong Kong on May 13, 1952. The present action was filed December 23, 1952, at which time there had been no formal denial of plaintiff's application for a passport. The court found, however, that the delay in acting upon the application was unreasonable and the failure to act on the application within a reasonable time was a denial of plaintiff's rights and privileges as a national and citizen of the United States.

Webster's New International Dictionary, Second Edition, defines the word "deny" as follows:

> "1. To declare not to be true; gainsay, contradict; —opposed to affirm, allow or admit. 2. To refuse (one who asks). 3. *To refuse to grant; to withhold; to refuse to gratify or yield to;* 4. . . . *to refuse to acknowledge.* . . ." (Italics added.)

Clearly by withholding the issuance to appellee of a travel document which would enable him to proceed to the United States, and to which any American citizen is entitled as a matter of right, appellant has in effect denied him such right upon the ground that he is not a citizen of the United States. Upon no other ground could the consul withhold or decline to issue the travel document.

An unreasonable delay in acting upon a passport application is equivalent to a denial thereof. (*Chin Chuck Ming v. Dulles, supra.*) Appellee maintains that under the circumstances in the instant case, a delay of over seven months in acting upon his passport application was unreasonable and an implied denial thereof.

As was aptly stated by the court in *Nuspel v. Clark,* 83 Fed. Supp. 963 at 965:

> "Counsel for defendant asserts that this 'holding in abeyance' does not constitute a denial of such rights and privileges. It seems, however, the failure to grant the visa for plaintiff's wife within a reasonable time constitutes a denial of such application equally as much as justice delayed is justice denied."

Over the objection of appellee, appellant introduced into evidence "Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong." [Deft. Ex. "B."] Appellee maintains that his objection should have been sustained since the evidence is clearly incompetent, irrelevant and immaterial. However, assuming but not conceding that the evidence was admissible, it supports appellee's contention that the delay in processing his case was unreasonable. From that document it would appear that defendant claims that the reasons for the delay in processing of passport applications were the transfer to the Hong Kong Consulate of a heavy load of cases from the Canton Consulate upon the closing of the latter Consulate in 1949, and the lack of facilities and personnel to process such cases; that as of September 1, 1952, more stringent examination and investigation procedures were authorized, including the blood-typing of claimants and their alleged parents.

However, from this same document it is noted that in November, 1950, the Department assigned a Foreign Service inspector, two departmental employees and fourteen members of the Foreign Service to Hong Kong and authorized the employment of sufficient local alien personnel to serve as interpreters and give clerical assistance and work on the backlog of pending citizenship claims. By July 1, 1951, this backlog had been reduced from 3600 to 2100 cases, some 600 of which were not "live." From June 1, 1951, to July 1, 1952, over 2600 cases were processed and by July 1, 1952, new claims were reduced to 25 per month. [P. 3.]

Since by the middle of 1952, there were only 25 new applications being filed each month, with additional facilities and personnel it appears obvious that passport applications could be acted upon within a seven months' period. As a matter of fact, appellee's application was processed in six months. Appellee's passport application was filed May 13, 1952. Blood tests were taken in September and October, 1952, and appellee was interviewed on October 28, 1952. On November 13, 1952, precisely six months after the filing of the application, an American Vice Consul recommended that it be denied. Appellant has furnished no excuse for the delay of practically another two months before there was a "formal" disapproval of appellee's passport application, nor does the document upon which appellant relies suggest any reason why such formal denial could not have been made prior to the date the instant action was filed.

As was stated in *Chin Chuck Ming v. Dulles, supra,* at page 852:

> "We construe the words 'right or privilege as a national of the United States' of the first two lines

of Section 503 to cover the right to a prompt disposition of a claimed citizens' application . . .

"* * *

"Dulles contends that we should take judicial notice of the fact that a large number of similar applications were pending on September 6, 1951 when appellants' was filed and that Congress has not appropriated sufficient funds to give him the qualified personnel at Hong Kong to enable the State Department to dispose of them in the intervening months. He makes no claim that he applied to Congress for such funds. Assuming we can take such judicial notice, we think the right to a prompt consideration of appellants' application cannot be denied them for such a reason."

See also:

Lee Bang Hong v. Acheson (D. C. Hawaii), 110 Fed. Supp. 48, 50;

Lee Hong v. Acheson (D. C., N. D. Cal.), 110 Fed. Supp. 60;

Look Yun Lin v. Acheson (D. C., N. D. Cal.), 95 Fed. Supp. 583, 584.

Moreover, on December 11, 1952, approximately one month after the Vice Consul had recommended that the passport application be denied, plaintiff's father cabled the American Consulate General at Hong Kong asking for a decision prior to December 23, 1952, in order to protect plaintiff's citizenship rights [Deft. Ex. "A."] On December 17, 1952, plaintiff's father wired the Passport Division of the Department of State in Washington, D. C., stating that he had been advised by the American Consul at Hong Kong that the passport application of his son, Quan Yoke Fong, had been transmitted with

appropriate recommendation to that office for final decision, and requesting that in order to protect his son's American citizenship rights, the department wire him collect prior to December 23, 1952, of their decision; that if not advised of a favorable decision prior to December 23, he would assume the application was denied. [Pltf. Ex. 8.] No reply to this telegram was received by plaintiff's father prior to December 23, 1952 [T. R. 138], yet a formal denial of the application was made two weeks thereafter.

In *Yung Jin Teung v. Dulles,* 229 F. 2d 244 at 246, the court stated:

> "First of all we note that the State Department may have effectively determined the plaintiff's claim of citizenship adversely even though it took no final official action which explicitly constituted such a determination. Thus a passport may be denied on the statutory ground by a refusal to determine a claim of citizenship for an unreasonable length of time, Chin Chuck Ming v. Dulles, 9 Cir., 1955, 225 F. 2d 849, or by insisting upon the production of evidence of citizenship when it is clear that the applicant cannot produce it. Wong Ark Kit v. Dulles, D. C. D. Mass. 1955, 127 F. Supp. 871; Ow Yeong Yung v. Dulles, D. C. N. D. Cal 1953, 116 F. Supp. 766. On the other hand if a delay in acting on an application is entirely the fault of the applicant, then such delay would not constitute a denial. Thus where the consul informs the applicant that no decision has been reached and requests certain additional evidence, there may yet be no effective denial if the applicant has neither produced additional evidence nor informed the consul that he will not do so. Ling Share Yee v. Acheson, 3 Cir., 1954, 214 F. 2d 4, certiorari denied 1954, 348 U. S. 873, 75 S. Ct. 109, 99 L. Ed.

687. We must therefore determine whether the papers here show that there had been no explicit adverse determination of the plaintiffs' claim and, further, that there had been no implicit adverse determination within the principle of these decisions."

The court further stated, at page 247:

". . . it should be noted that the statute barring suits after December 24, 1952 was passed in June of 1952, thus putting the government on notice that unless it acted in six months applicants might lose their rights to bring action under the statute."

It is submitted that there was ample evidence upon which the District Court could find, as it did, that the delay of over seven months in acting upon plaintiff's passport application was unreasonable and that therefore there was an implied denial thereof.

III.

The District Court Properly Denied Appellant's Motion for New Trial.

Appellant's motion for new trial was upon the grounds of "newly-obtained" and "newly-discovered" evidence which, he alleged, defendant could not with reasonable diligence have obtained and produced at the trial. The evidence which defendant desired to introduce, according to the affidavits filed in support of his motion [T. R. 41-56], consists of the results of the blood tests taken of plaintiff's parents on June 9, 1955, pursuant to the order of the District Court of May 10, 1955, and the result of a blood test made of specimens of blood contained in vials received by the West Coast Medical Laboratories from Hong Kong on August 15, 1955, allegedly bearing the name of Quan Yoke Fong, and which, appellant asserts,

would prove that "it is not possible for appellee to be the child of his alleged father, and that consequently, it was not possible for appellee to have acquired citizenship of the United States at birth pursuant to Section 1993, Revised Statutes of the United States." (Op. Br. p. 15.)

Defendant contended he could not with reasonable diligence have obtained and produced such evidence at the trial because (1) plaintiff has at all times since his petition was filed resided in Hong Kong, B. C. C.; (2) defendant's counsel did not receive the passport file relating to plaintiff until March 19, 1954, although the action was filed December 23, 1952; (3) on March 19, 1954, defendant's counsel did not know whether defendant would permit plaintiff to come to the United States for the purpose of trial and he did not believe the matter would be tried in the absence of plaintiff and (4) defendant's counsel believed until March 1, 1955, that certain evidence in his possession, to wit, "reports of blood tests made of plaintiff and his alleged parents" would be admissible in evidence. [T. R. 43-44.]

This action was filed December 23, 1952. It was not tried until June 1, 1955. During this period of approximately two and a half years defendant knew that plaintiff was residing in Hong Kong, B. C. C., and that he would not permit plaintiff to come to the United States for the trial of the action. During this same period of time defendant or his attorneys were in possession of the passport file. Defendant is therefore in no position to complain of the fact that he failed to advise his attorneys as to his intentions and neglected to furnish his counsel with the passport file until sixteen months after the filing of the petition herein. Defendant could very easily have otbained the evidence which he now seeks to introduce

on a new trial by granting plaintiff's application for a Certificate of Identity and permitting him to proceed to the United States for the purpose of trial.

Defendant's counsel admitted in his affidavit in support of his motion for new trial that defendant had in his possession long prior to the time of trial evidence consisting of the results of blood tests taken of plaintiff and his parents. He alleges, however, that he thought such evidence was admissible until the decision of Court on March 1, 1955, in *Ong Hong Way v. Dulles,* Civil No. 13,379, holding such reports of blood tests not admissible. Some two months later, defendant moved the District Court for an order requiring plaintiff to furnish a blood sample to be transported to the United States for testing. It was for that reason, defendant's counsel alleged in his affidavit, that he could not with reasonable diligence have discovered and produced at the trial the evidence which he now asserts is newly-discovered and newly-obtained. [T. R. 43-44.]

Obviously this was not newly-discovered and newly-obtained evidence. It is the same evidence which defendant had in his possession long prior to the time of trial but in a form which he now is of the opinion is admissible. That a party learns for the first time prior to or at the time of trial that his evidence is inadmissible in the form in which it is his intention to offer it is clearly not grounds for a new trial after he has obtained the same evidence in what he considers to be a "form which is admissible." Following defendant's reasoning, if the evidence which he now claims is in a form which is admissible should, at or prior to a new trial, be held inadmissible, he could use that as grounds for another new trial if he obtained the same evidence in still another form.

As the District Court stated in its memorandum:

> "This matter has been pending in the court since December, 1952. Nearly three years have elapsed since plaintiff filed his action. If plaintiff has any legitimate claim, it should be passed upon. It should, in fact, have been passed upon before now." [T. R. 34.]

Moreover, the evidence upon which defendant is seeking a new trial would be inadmissible. The blood test of plaintiff's parents taken on June 9, 1955, was pursuant to the order of the District Court of May 10, 1955. This order was void since the court was without jurisdiction to order plaintiff's parents, who were not parties to the action, to submit to a blood test under Rule 35(a) of the Federal Rules of Civil Procedure. (*Fong Sik Leung v. Dulles,* 226 F. 2d 74.) Plaintiff's parents did not appear voluntarily but in compliance with an invalid order. The evidence having been illegally obtained was, therefore, inadmissible.

Concededly no blood test could be made of the blood sample allegedly drawn from plaintiff pursuant to the order of the District Court of May 10, 1955, the same having hemolyzed. Thereafter, on July 1, 1955, defendant moved the court for a supplemental order to require plaintiff to furnish a blood sample. On the hearing on defendant's motion held on July 18, 1955, the matter stood submitted. On August 16, 1955, the motion was denied. Nevertheless, without waiting for a hearing on his motion, defendant on August 12, 1955, caused the Vice Consul at Hong Kong to obtain a blood sample from plaintiff. According to the affidavit of the Vice Consul such sample was obtained "for the second time as directed by the Department of State in an instruction

dated July 6, 1955." [T. R. 56.] Attention of the court s also called to the fact that the Vice Consul alleges in his affidavit that he personally witnessed the "drawing of *two samples* of blood from Quan Yoke Fong" by Dr. Eric Vio, and such *samples* were "placed by said doctor in *vials*" in the presence of the affiant. [T. R. 56.] The affidavit of Albert L. Blifeld [T. R. 46] alleges that on August 15, 1955, there was delivered to West Coast Medical Laboratories a sealed container, which by its markings indicated it was sent from Dr. E. Vio; that inside this container were several vials, also sealed, *'two of which* bore the name of Quan Yoke Fong." Dr. Eric Vio alleges in his affidavit [T. R. 52] that on the 12th day of August, 1955, "I drew *a sample* of blood from Quan Yoke Fong" and such sample was "forthwith placed by me in *"a vial"* and *"said vial"* was sealed and *"said vial"* was then delivered to Pan American Airways. In the affidavit of Quan Yoke Fong it is alleged that on August 12, 1955, "Dr. Vio took *a sample* of blood from me and such blood *samle* was forthwith placed by him in *'a vial'* and the *'said vial'* was then sealed." [T. R. 54.] (Italics added.)

It is submitted that such evidence of the results of blood tests would be inadmissible since (1) it was illegally obtained and (2) it could not be introduced by way of affidavits.

In any event, a motion for a new trial is directed to the sound judicial discretion of the trial court.

Holmgren v. United States, 217 U. S. 509, 54 L. Ed. 861, 30 S. Ct. 588;

Sparrow v. Strong, 70 U. S. 97, 3 Wall. 97, 18 L. Ed. 49;

Life & Fire Ins. Co. of New York v. Wilson's Heirs, 33 U. S. 291, 8 Pet. 291, 8 L. Ed. 949;

Elzig v. Gudwangen, 91 F. 2d 434;

Davis v. Yellow Cab Co. of St. Petersburg, 220 F. 2d 790, 791.

See also cases cited in:

39 Am. Jur., New Trial, Sec. 201, p. 199.

Appellee maintains that in the instant case the District Court did not abuse its discretion and the motion was properly denied.

IV.

The District Court Did Not Prevent Appellant From Presenting or Offering Evidence to Show That Appellee's Blood Was Incompatible With That of His Parents.

At the time of the trial on June 1, 1955, it was the understanding of both counsel and the District Court that the testimony of the witnesses would be taken and that the matter would then be continued until the results of the blood tests taken pursuant to the order of the court of May 10, 1955, had been received, at which time a further hearing would be set for the sole purpose of taking evidence relative to such blood tests. [T. R. 62, 145.] Appellant could have offered any evidence which he desired to offer at the trial on June 1, 1955. He offered no other evidence and it was understood by both counsel and the District Court that the trial of the case was completed with the exception of the results of the blood tests, as aforesaid.

Appellant now states that if the hearing of June 1, 1955, had not been only a partial trial, appellant would have offered in evidence the reports of Dr. Vio contained in Exhibit "A," and if these reports were rejected,

moved the court for a reasonable continuance in order that the deposition of Dr. Vio might have been obtained. He admits, however, that on March 1, 1955, the court had ruled that such reports were not admissible, and for that reason he had moved to have a sample of appellee's blood shipped to the United States for testing. Appellant had from March 1, 1955, to the time of trial to obtain the deposition of Dr. Vio, had he so desired. Obviously, appellant had no intention of offering the report of Dr. Vio contained in Exhibit "A" and was relying solely upon the results of the blood tests taken pursuant to the order of the court of May 10, 1955. At no time did appellant indicate he wanted to offer in evidence the results of the blood tests taken in 1952. Appellant's argument to the court on August 16, 1955, at which time he urged the court to permit him to make an offer of proof, was directed solely to the results of the blood tests of the parents taken pursuant to the invalid order of the District Court of May 10, 1955, and to the result of the blood test of the sample allegedly taken from the plaintiff on August 12, 1955, at the direction of the appellant and without court order. [T. R. 146-148.]

As has been heretofore stated, on June 1, 1955, the matter was continued solely for the purpose of allowing appellant to offer into evidence the results of the blood tests obtained pursuant to the order of the District Court of May 10, 1955. On July 18, 1955, the court had taken defendant's motion for the supplemental order under submission, allowing defendant until August 15, 1955, to produce affidavits relative to certain matters in Hong Kong. [T. R. 146.] This not having been done, the court declined to continue the matter further and on August 16, 1955, denied defendant's motion. [T. R. 35.] Moreover, appellant admitted on his motion for

a supplemental order to require plaintiff to furnish a blood sample that he could not offer evidence of the result of the blood test of plaintiff because the blood sample had hemolyzed. This being admitted, there was no reason for the court to continue the case for further trial upon denying the motion for the supplemental order.

V.

The District Court Did Not Err in Denying Appellant's Motion for a Supplemental Order to Require Appellee to Furnish a Blood Sample.

Defendant did not comply with the order of the District Court in the taking of plaintiff's blood test. Rule 35(a) requires the examination to be made by a physician and the order to specify the person or persons before whom the examination is to be made. As stated in *Fong Sik Leung v. Dulles,* 226 F. 2d 74, at page 79: "The right to the names of one or more such physicians is to enable the litigant to protest to the court that the examining persons are incompetent or prejudiced, the latter on various grounds, . . ." The order of the District Court named Dr. L. T. Ride, Vice Chancellor, Hong Kong, B. C. C., as the physician to whom plaintiff should present himself for the taking of the blood test. Contrary to said order defendant directed plaintiff to Dr. Vio, a physician of his own selection, at the same time requiring plaintiff to pay Dr. Vio $256.00 Hong Kong currency and $4.00 American currency to the American Consulate General. Upon the arrival of a blood sample in the United States, alleged to be that taken from plaintiff, it was discovered that the blood had hemolyzed and could not be tested. Thereupon defendant filed a notice of motion for a supplemental order to require plaintiff to furnish a blood sample. However, before such motion

ould be heard defendant, without authority of the court, gain directed plaintiff to Dr. Vio for the purpose of ubmitting to another blood test. Counsel for plaintiff vas not advised in the matter and was therefore pre-luded from objecting and from advising plaintiff. Under he circumstances of the taking of the blood test it can-ot be said that plaintiff voluntarily submitted thereto. n any event, plaintiff complied with the court's order f May 10, 1955—defendant did not. As pointed out y the District Court in its memorandum, defendant filed is motion to require plaintiff and his parents to fur-ish blood samples shortly before the time of trial and 9 months after the petition was filed. Nevertheless, the ourt granted defendant's motion and continued the trial or sixty days to permit defendant to introduce the esults of such tests. Defendant did not comply with he court's order but selected a physician of his own hoosing and the blood sample allegedly shipped by such hysician could not be tested because it had hemolyzed. Clearly under such circumstances the court was justi-ied in denying defendant's motion, the granting of which would have necessitated a further indefinite continuance.

Furthermore, the court was aware of the fact that nder the decision in *Fong Sik Leung v. Dulles, supra,* ts order of May 10, 1955, directing plaintiff's parents o submit to a blood test was invalid. Obviously there would be no point in ordering plaintiff to submit to a lood test if the results of the blood tests of his parents was inadmissible.

The District Court stated in its memorandum filed August 16, 1955, as follows:

> "At the time of trial the mother and father of plaintiff appeared in Court, and each testified plain-

tiff was their son. Had there not been a request by defendant that plaintiff and the parents furnish a blood sample, the Court would have rendered judgment for plaintiff from the bench at the conclusion of the trial, as the testimony of a mother undoubtedly is the best evidence obtainable relative to the paternity and birth of her child. The government filed its motion requesting blood samples just prior to trial.

"Judgment at the time of trial was delayed because of the blood sample request. The matter was submitted to the Court on the evidence presented at the trial. The Court is satisfied with the testimony of the witnesses in this case, which testimony in the Court's opinion establishes plaintiff's claim that he is the son of an American citizen. The Court does not feel constrained to continue the matter further." [T. R. 34.]

Appellee submits that the court was well within its discretion in refusing to continue the matter further for the purpose of allowing appellant to obtain another blood sample from plaintiff.

Conclusion.

Wherefore, for the reasons hereinabove set forth, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

KATHLEEN PARKER,

Attorney for Appellee.